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VIA HAND DELIVERY

James J. Jochum
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Certification Of Factual Information To Import Administration During
Antidumping And Countervailing Duty Proceedings

Dear Assistant Secretary Jochum:

On September 22, 2004, the Department of Commerce (the "Department") published a notice of proposed rulemaking and request for comments regarding the certification of factual information to Import Administration during antidumping and countervailing duty proceedings ("the Notice").¹ The Notice included proposed amendments to 19 C.F.R. § 351.303(g) affecting the factual certifications provided by companies and their legal representatives in such proceedings. On behalf of the

¹ 69 Fed. Reg. 56,738.

Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, the Free Trade Lumber Council and Tembec Inc., we submit the following comments in response to the Notice. We also are attaching as Exhibit A a revised version of the proposed certifications reflecting our comments.

I. OVERVIEW

We consider the factual certifications currently required by 19 C.F.R. § 351.303(g) for companies and their legal representatives to be adequate and reasonable in protecting the integrity of factual submissions. Potential sanctions for companies and their legal representatives who knowingly submit false statements are adequate and the Notice does not suggest otherwise.

In addition to the sanctions applicable under U.S. law, attorneys representing companies in antidumping and countervailing duty proceedings are subject to rules of professional conduct that prohibit attorneys from making or advising their clients to make false statements in such proceedings. Attorneys who violate the rules of professional conduct risk suspension and revocation of their license to practice law. These sanctions are strong incentives for counsel and the persons they represent to provide accurate and complete factual submissions. We do not believe, therefore, that the significant changes to existing factual certifications proposed by the Notice are necessary.

We oppose changes to the factual certifications that would compromise attorney-work product principles or that would require more stringent representations by

legal counsel and their clients than would be required in litigation before U.S. federal courts. Moreover, the Department must consider carefully the relative efficacy of any proposed change in improving the integrity of factual submissions and the administrative burden that such a change would impose on companies participating in antidumping and countervailing duty proceedings. Some of the factual certification changes proposed by the Department would not impose a significant administrative burden and, although their efficacy in improving factual submissions might be minimal, we would not oppose them.

Provided below are our comments on each of the changes to the factual certifications in 19 C.F.R. § 351.303(g) proposed by the Department in its Notice, in the order that they appear in the proposed amended certifications. Our comments are followed by Exhibit A, which represents a revised version of the proposed factual certifications based on these comments.

II. CHANGES TO COMPANY CERTIFICATION

A. Date And Title

The Department proposes that the company certifications include the date the factual certification was made and identify the specific factual submission by title and date to which the certification applies. To effect this change, the Department proposes amending the company certification under 19 C.F.R. § 351.303(g)(1) to read:

On this ____ day of (MONTH), (YEAR), I, (PRINTED NAME AND TITLE), currently employed by (COMPANY NAME), certify that I prepared or otherwise supervised the preparation of the

attached submission of (IDENTIFY THE SPECIFIC SUBMISSION BY TITLE AND DATE) pursuant to the (INSERT ONE OF THE FOLLOWING: THE (ANTIDUMPING OR COUNTERVAILING DUTY) INVESTIGATION OF (PRODUCT) FROM (COUNTRY) or THE(DATES OF POR) (ADMINISTRATIVE or NEW SHIPPER) REVIEW UNDER THE (ANTIDUMPING OR COUNTERVAILING) DUTY ORDER ON (PRODUCT) FROM (COUNTRY)).²

We oppose the proposed mandatory inclusion of dates on company certifications as burdensome when companies sometimes are providing several certifications almost simultaneously, or are certifying in advance of submission or on a different day (e.g., the submission is completed and certified a few days in advance of the filing date). This requirement could be a source of confusion, and otherwise accomplishes nothing.

The company certification should not have to identify the specific submission by administrative proceeding, title and date to which the certification applies. Company certifications should be presumed to apply to the factual submissions and transmittal letter to which they are attached. Factual certifications also are required by 19 C.F.R. § 351.303(d)(2) to be submitted under transmittal letter to the Department. These transmittal letters invariably contain the date and title of their accompanying factual submission, including the name of the antidumping or countervailing duty proceeding. Requiring company officials to write in the date and title of the factual submission to which their certification applies could give rise to trivial and burdensome controversies about whether the title of the submission was transcribed accurately in the

² 69 Fed. Reg. 56,740.

certification, whether an earlier date corresponds to the filing date, and whether any errors in transcription have legal significance for the certification.

B. Providing Names Of Company Employees Working On Factual Submission

The Department proposes that companies provide the names of all persons with significant responsibility for preparation or supervision of preparation of a factual submission. The Department therefore proposes amending 19 C.F.R. § 351.303(g)(1) to read:

I certify that I had sole or substantial responsibility for preparation (or supervision of the preparation) of this submission and have a reasonable basis to formulate an informed judgment as to the accuracy and completeness of the information contained in this submission. If I supervised the preparation of this submission, I list below those other individuals with significant responsibility for preparation of part or all of the submission.

* * *

I supervised the preparation of this submission. The following is a list of those other individuals with significant responsibility for preparation of part or all of the submission:

Printed Name: _____

Title: _____

Section: _____

Printed Name: _____

Title: _____

Section: _____

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³ *Id.*

Companies should not be required to provide the names of all persons having substantial responsibility for the supervision or preparation of a factual submission. The only signature necessary for the company certification should be the signature of the person "officially responsible for presentation of the factual information" as 19 C.F.R. § 351.303(g)(1) currently requires. The signature of the person "officially responsible" is sufficient to indicate the company's representation regarding the accuracy and completeness of the factual submission, and to justify the Department's use of "adverse facts" when a company has intentionally misrepresented facts to the Department. The Department does not need a list of additional persons to hold a company responsible for inaccuracies in its factual submissions.

Opinions may vary as to who should be considered a "person with significant responsibility," for preparing part of a factual submission, which could lead to unnecessary controversies with the Department or opposing parties. Depending on the interpretation, the list of persons contributing to the factual submission could be very long, and it may be difficult to identify with particularity the facts in a submission for which each person had responsibility. The requirement of identifying all such individuals would impose a significant administrative burden. For governments, large companies or anyone submitting large documents, identification of all persons with significant responsibility for preparing or supervising preparation of factual submissions

would be a virtually impossible task with no real benefit to the Department's investigation or review process.

This requirement could also raise issues of confidentiality. It is not obvious that companies should have to reveal which personnel, in which divisions or departments, have assembled or initially prepared information. The Department needs someone in a company to be identified and responsible. The existing certification requirements provide the means for meeting that need.

C. Notification Regarding Misrepresentations Or Omissions

The Department's proposed company certification would require that the person certifying under § 351.303(g)(1) notify the Department of any misrepresentation or omission of fact discovered subsequent to the filing of the factual submission:

I certify that the information contained in this submission is, to the best of my knowledge, accurate and complete. I am aware that this certification is deemed to be continuing in effect, such that I must notify Import Administration, in writing, if at any point in this segment of the proceeding I possess knowledge or have reason to know of any material misrepresentation or omission of fact in this submission or in any previously certified information upon which this submission relies.⁴

Requiring the company to notify the Department directly of such matters would interfere with the attorney-client relationship where the company is represented by legal counsel. The company's legal representative has a responsibility to advise the company whether

⁴ *Id.*

certain information is material to the proceedings, contradicts other factual material previously submitted, and requires notification to the Department. The obligation to notify the Department of a discovered misrepresentation or omission of fact should rest with the legal representatives, not their clients. And so it now does through counsel certification.

D. Reminder Of Possible Sanctions

The Department proposes to remind companies making factual certifications that the persons certifying may be subject to sanctions under U.S. law:

I am aware that the information contained in this submission is subject to verification by the Department. I am also aware that U.S. law imposes criminal sanctions (including, but not limited to, 18 U.S.C. 1001) on individuals who knowingly make misstatements to the U.S. government.⁵

We do not oppose company certifications containing a reference to the sanctions under U.S. law that may apply for providing false statements to the Department. However, the language in the Department's proposed amendment of 19 C.F.R. § 351.303(g)(1) is confusing and does not accurately reflect the statute cited. The proposed amendment states that "individuals who knowingly make misstatements to the U.S. government" are subject to criminal sanctions under 18 U.S.C. § 1001. That statute, however, refers to "false, fictitious, or fraudulent statements" rather than "misstatements":

⁵ *Id.*

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.⁶

Furthermore, the language of the proposed company certification is confusing because “misstatements” are more likely to be understood by company officials as statements that are unintentionally inaccurate. To the extent that the Department determines to refer to sanctions in company certifications, the certification should say that “U.S. law imposes criminal sanctions (including, but not limited to, 18 U.S.C. 1001) on individuals who knowingly make false statements to the U.S. government.”

E. Company Obligation To Maintain Original Certifications

The Department proposes that companies maintain original copies of their factual certifications in their own files for verification purposes by the Department:

I also certify that the original of this signed certification will be maintained as part of my company's official records and will be available for inspection by Department of Commerce officials during any verification.

Signed: _____
Date: _____ 7

⁶ 18 U.S.C. § 1001(a).

We do not see the practical utility of requiring companies to maintain their original certifications on file for verification, and therefore oppose such an amendment to the company certifications. Company certifications under 19 C.F.R. § 351.303(g)(1) contained in factual submissions to the Department should be presumed authentic and effective on behalf of the company for whom they are submitted. The Department should not be questioning the validity of signatures on company certifications as part of its verification process. The accuracy and completeness of the factual submission can neither be improved nor impaired by retention of the originally-signed factual certification in the company's files for verification. Whether a company maintains in its files the original copy of its company certification should not change the legal effect of submitting a company certification with a factual submission.

Companies and their legal representatives may prefer to keep original company certifications in the legal representative's files, either because they lack the storage space for voluminous files in antidumping or countervailing duty proceedings, or because they prefer that legal counsel, with all of the protections afforded by professional rules of responsibility and malpractice liability, assume responsibility for sensitive documents in the proceedings.

⁷ 69 Fed. Reg. 56,740.

Were a legal representative to submit a company certification for its client but without the client's authorization, the legal representative would be subject to professional discipline, liability for malpractice, and possibly criminal sanctions. Such matters would be for the company and its legal representative to resolve without the unsolicited intercession of the Department. The proposed requirement that companies maintain original copies of their factual certifications for review at verification is unnecessary, interferes with attorney-client relations, and should be omitted from the company certification.

III. CHANGES TO LEGAL REPRESENTATIVE'S CERTIFICATION

A. Date And Title

The Department proposes adding the date and title of the factual submission to the certification required of legal representatives under 19 C.F.R. § 351.303(g)(2):

On this ____ day of (MONTH), (YEAR), I, (PRINTED NAME), with (LAW FIRM or OTHER FIRM), counsel or representative to (COMPANY OR PERSON), certify that I have read the attached submission of (IDENTIFY THE SPECIFIC SUBMISSION BY TITLE AND DATE) pursuant to the INSERT ONE OF THE FOLLOWING: THE (ANTIDUMPING OR COUNTERVAILING DUTY) INVESTIGATION OF (PRODUCT) FROM (COUNTRY) or THE (DATES OF POR) (ADMINISTRATIVE or NEW SHIPPER) REVIEW UNDER THE (ANTIDUMPING OR COUNTERVAILING) DUTY ORDER ON (PRODUCT) FROM (COUNTRY).⁸

⁸ *Id.* at 56,740-41.

We do not oppose a requirement that the legal representative's certification include the date on which it was made, but note that the certification as proposed by the Department includes the date in three different places: twice in the first sentence of the certification as quoted above, then once again at the end of the certification. One date near the signature at the end of the certification should be sufficient.

Identification of the specific submission by administrative proceeding, title and date would be redundant because both the factual submission and the transmittal letter (required by 19 C.F.R. § 351.303(d)(2)) to which the certification was attached would provide such information. Including the title of the factual submission and the name of the proceeding in the legal representative's certification could only be useful if the certification were not attached to the factual submission. As with company certifications, the legal representative's certification is appended to the submission to which it applies, so there should be no confusion about what factual submission is covered by the certification.⁹

B. Providing Names Of Legal Representatives Working On Factual Submission

The Department proposes that companies provide the names of all legal representatives with significant responsibility for advising, preparing or reviewing a

⁹ In addition, the phrase "pursuant to" as contained in the proposed legal representative's certification is confusing and seems grammatically incorrect. Legal representatives make their certifications "pursuant to" the regulation found at 19 C.F.R. § 351.303(g)(2), not "pursuant to" the antidumping investigation of a product from a country.

factual submission. The Department therefore proposes amending 19 C.F.R.

§ 351.303(g)(2) to read:

Based on the information made available to me and knowledge acquired by me in my role as adviser, preparer or reviewer of the submission, and after an inquiry reasonable under the circumstances, I certify that to the best of my knowledge the submission is accurate and complete. If I supervised the advising, preparing or review of this submission, I list below those other individuals with significant responsibility for advising, preparing or reviewing part or all of the submission.

* * *

I supervised the advising, preparing or review of this submission. The following is a list of those other individuals with significant responsibility for advising, preparing or reviewing part or all of the submission:

Printed Name: _____

Title: _____

Section: _____

Printed Name: _____

Title: _____

Section: _____¹⁰

We oppose this proposed change to the legal representative's certification. The information requested interferes with the attorney-work product privilege. It is not the business of the Department nor of any of the parties in the administrative proceedings to know how a law firm assigns its attorneys and staff to prepare and review factual submissions, nor which attorneys are providing advice to the client on certain aspects of factual submissions. Even U.S. federal courts do not require

¹⁰ 69 Fed. Reg. 56,741.

attorneys to provide the type of work-product information proposed in the Notice for court submissions on behalf of clients.

Nor would such information do anything to improve the accuracy and completeness of factual submissions to the Department. In our experience, the legal representative's certification is executed by the attorney supervising the preparation of the submission. Under applicable law and rules of professional responsibility, the supervising attorney is legally responsible for the work of subordinate attorneys and legal staff. Should the Department have any questions regarding the accuracy or completeness of a factual submission, the person executing the legal representative's certification bears full responsibility for addressing those questions. The only relevant inquiries for the Department are the ones already contained in the current legal representative's certification in 19 C.F.R. § 351.303(g)(2)—whether the legal representative has reviewed the submission and has any reason to believe that the submission contains any material misrepresentation or omission of fact.

C. Notification Regarding Misrepresentations Or Omissions

The Department's proposed legal representative certification would require that the person certifying under 19 C.F.R. § 351.303(g)(2) notify the Department of any misrepresentation or omission of fact discovered subsequent to the filing of the factual submission:

I am aware that this certification is deemed to be continuing in effect, such that I must notify Import Administration, in writing, if at any point in this segment of the proceeding I possess knowledge or

*have reason to know of a material misrepresentation or omission of fact in this submission or in any previously certified information upon which this submission relies.*¹¹

We had understood this obligation to notify already to be in effect for legal representatives; therefore, we do not oppose its explicit inclusion in 19 C.F.R. § 351.303(g)(2) as proposed by the Department.

D. Reminder Of Possible Sanctions

The Department proposes to remind legal representatives making factual certifications that the persons certifying may be subject to sanctions under U.S. law:

*I am aware that U.S. law imposes criminal sanctions (including, but not limited to, 18 U.S.C. 1001) on individuals who knowingly make misstatements to the U.S. government.*¹²

We do not oppose legal representative's certifications containing a reference to the sanctions under U.S. law that may apply for providing false statements to the Department, but as noted above, the language in the Department's proposed amendment of § 351.303(g)(2) is confusing and does not accurately reflect the statute cited. To the extent that the Department determines to refer to sanctions in legal representative's certifications, the certification should say that "U.S. law imposes criminal sanctions (including, but not limited to, 18 U.S.C. 1001) on individuals who knowingly make false statements to the U.S. government."

¹¹ *Id.*

¹² *Id.*

E. Legal Representative's Obligation To Submit Original Certification

The Department proposes amending the certification in 19 C.F.R. § 351.303(g)(2) to certify that the original copy is being submitted to the Department with the factual submission:

I certify that I am filing the original of this signed certification with this submission to the Department of Commerce and that I will retain a copy during the pendency of this proceeding.

Signed: _____
Date: _____¹³

It is our usual practice to file original signed certifications of counsel with factual submissions. However, there are circumstances in which providing the original signed certification with the filing would be impracticable. For example, the attorney responsible for the submission may not be physically present in Washington on the filing date (e.g., the attorney may be at the client's facility preparing the submission). Under the current procedures the responsible attorney could transmit electronically a facsimile or PDF copy of the signed certification to Washington for the filing. The Department's proposed requirement for an original signed certification would impair significantly counsel's ability to have the most appropriate attorney provide the certification.

IV. CONCLUSION

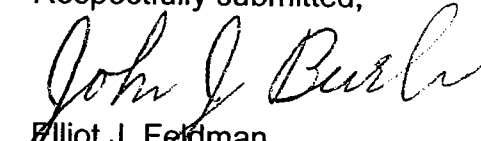
As noted above, attached to these comments as Exhibit A is a draft version of the company and legal representative's factual certifications under 19 C.F.R.

¹³ *Id.*

Assistant Secretary James J. Jochum
November 22, 2004
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§ 351.303(g) as they reflect our comments either for or against the amendments
proposed by the Department in its Notice.

Respectfully submitted,



Elliot J. Feldman
John J. Burke
Michael S. Snarr

EXHIBIT A

(Revised Version Of Proposed Factual Certifications Reflecting Comments)

For the person(s) officially responsible for presentation of the factual information:

COMPANY CERTIFICATION

I, (PRINTED NAME AND TITLE), currently employed by (COMPANY NAME), certify that I had sole or substantial responsibility for preparation (or supervision of the preparation) of this submission and have a reasonable basis to formulate an informed judgment as to the accuracy and completeness of the information contained in this submission. I certify that the information contained in this submission is, to the best of my knowledge, accurate and complete. I am aware that the information contained in this submission is subject to verification by the Department. I am also aware that U.S. law imposes criminal sanctions (including, but not limited to, 18 U.S.C. 1001) on individuals who knowingly make false statements to the U.S. government.

Signed: _____

For the person's legal counsel or other representative:

REPRESENTATIVE CERTIFICATION

I, (PRINTED NAME) with (LAW FIRM or OTHER FIRM), certify that I have read the attached submission. Based on the information made available to me and knowledge acquired by me in my role as adviser, preparer or reviewer of the submission, and after an inquiry reasonable under the circumstances, I certify that to the best of my knowledge the submission is accurate and complete. I am aware that this certification is deemed to be continuing in effect, such that I must notify Import Administration, in writing, if at any point in this segment of the proceeding I possess knowledge or have reason to know of a material misrepresentation or omission of fact in this submission or in any previously certified information upon which this submission relies. I am aware that U.S. law imposes criminal sanctions (including, but not limited to, 18 U.S.C. 1001) on individuals who knowingly make false statements to the U.S. government.

Signed: _____

Date: _____